

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1082

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P/S

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

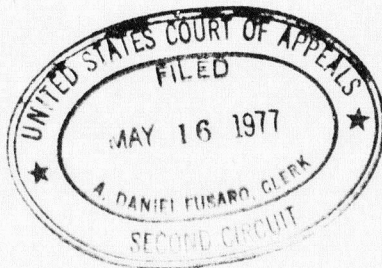
against

ROBERT J. LANE,

Defendant-Appellant

Appeal From Orders and Judgment of the
United States District Court for the
Western District of New York

~~4~~ APPENDIX
BRIEF FOR DEFENDANT-APPELLANT



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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.	ii
Statement of the Issues Presented for Review	iv
Statement of the Case	1
Statement of Relevant Facts	3
Arugment	
POINT I - BY VIRTUE OF THE MORE THAN FIVE YEAR PRE-INDICTMENT DELAY AND FOUR YEAR, TEN MONTH POST-INDICT- MENT DELAY, THE APPELLANT WAS DEPRIVED OF HIS RIGHT TO A SPEEDY TRIAL AS GUARANTEED BY THE CON- STITUTION OF THE UNITED OF THE UNITED STATES, THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, THE RULES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK AND THE FEDERAL RULES OF CRIMINAL PROCEDURE.	6
Conclusion	22

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Barker v. Wingo</u> , 407 U.S. 514 (1974)	9, 17, 21
<u>Hilbert v. Dooling</u> , 476 F 2d 355 (2nd Cir, 1973)	13
<u>Klopper v. North Carolina</u> , 386 U.S. 213 (1966)	20
<u>Mann v. United States</u> , 304 F 2d 394 (D.C. Cir, 1962)	15
<u>Pollard v. United States</u> , 352 U.S. 354	14
<u>Tarlton v. Saxbe</u> , 507 F 2d 1116 (D.C. Cir, 1974)	21
<u>United States v. Calloway</u> , 505 F 2d 311 (D.C. Cir, 1974)	18
<u>United States v. Cartano</u> , 420 F 2d 362 (1st Cir, 1970)	14
<u>United States v. Ewell</u> , 383 U.S. 116 (1966)	21
<u>United States v. Favaloro</u> , 493 F 2d 623 (2nd Cir, 1971)	18
<u>United States v. Fay</u> , 505 F 2d 1037 (1st Cir, 1974)	18
<u>United States v. Latimer</u> , 511 F 2d 498 (10th Cir, 1975)	18

TABLE OF AUTHORITIES (Cont.)

	<u>Page</u>
<u>United States v. Marion</u> , 404 U.S. 307 (1971)	9
<u>United States v. Palermo</u> , 27 FRD 393 S(DNY, 1961)	14
<u>United States v. Pierro</u> , 478 F 2d 386, 388 (2nd Cir, 1973)	12
<u>United States v. Pollack</u> , 474 F 2d 828, 830 (2nd Cir, 1973)	12
<u>United States v. Reingold</u> , 384 F.S. 464, 466 (WDNY, 1974)	12
<u>United States v. Roberts</u> , 515 F 2d 642 (2nd Cir, 1975)	9, 17, 18 and 21
<u>United States v. Salzmann</u> , 417 F. Supp 1139 (EDNY, 1976)	14
<u>United States v. Vispi</u> , 545 F 2d 328 (2nd Cir, 1976)	8, 17, 19
<u>United States v. Ward</u> , 240 F. Supp. 659 (WD Wis, 1965)	14
<u>United States v. West</u> , 504 F 2d 253 (D.C. Cir, 1974)	18

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Appellant was deprived of a speedy trial as guaranteed by the Rules of the United States Court of Appeals for the Second Circuit and the District Court Rules for the Prompt Disposition of Criminal Cases.

2. Whether it was an abuse of discretion for the District Court not to dismiss the indictment pursuant to Federal Rules of Criminal Procedure 48(b).

3. Whether the Appellant was denied his right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

On February 17, 1972, Appellant Robert J. Lane was indicted (three misdemeanor counts) in the Western District of New York for the knowing failure to file income tax returns for the years 1965, 1966 and 1967 in violation of 28 U.S.C. §7203.

On October 9, 1975, Appellant moved to dismiss the indictment for failure to prosecute. The motion was denied.

Thereafter, on December 17, 1976, Appellant again moved to dismiss the indictment for failure to prosecute. This motion was also denied.

On December 21, 22 and 23, 1976, trial was had before the Honorable Harold P. Burke, United States District Judge for the Western District of New York, and a jury.

On December 23, 1976, the jury returned a verdict of guilty on all three counts.

On January 24, 1977, Appellant was sentenced to a fine of \$1,000.00 on count one, and \$500.00 each on counts two and three.

Notice of Appeal was duly filed thereafter

This is an appeal from various orders of the Honorable Harold P. Burke, United States District Judge, as follows:

1. Order denying Motion to Dismiss the Indictment, dated December 8, 1975.
2. Order denying Motion to Dismiss the Indictment, made on or about December 21, 1976.
3. Judgment of Conviction filed January 24, 1977.

STATEMENT OF RELEVANT FACTS

This case presents to the Court a situation not uncommon in the case of busy practicing attorneys, a failure to timely file Federal Income Tax returns. The Appellant, Robert J. Lane, is an attorney licensed in the State of New York. The tax years in question are 1965, 1966 and 1967. Appellant's taxable income for the three years was \$13,564.63 (A-1), \$7,412.68 (A-1), and \$8,721.41 (A-2), respectively. The returns for the tax years 1965 and 1966 were filed on October 29, 1968 (A-3), and for the tax year 1967 on August 16, 1969 (1967) (A-4). Appellant's entire tax liability including penalties and interest was \$15,477.20.* The tax was paid on November 5, 1970. (A-5)

In connection with this matter, the Collection Division of the Internal Revenue Service began an investigation of Appellant's income tax returns on February 2, 1967 (A-6). At that time Agent Conley was assigned to the case (A-7). Thereafter, the case was transferred to Agent McGillicuddy, also of the Collection Division (A-7). During August of 1968

*Of this amount, approximately \$6,000.00 represented overpayment.

the case was again transferred to Agent Kolb of the Intelligence Division (Criminal Branch) of the Internal Revenue Service for further investigation (A-7).

During the years 1968 through 1970 Agent Kolb conducted no less than twelve separate meetings with Appellant. (A-10) Appellant cooperated fully with the agent, and by May of 1970 the matter was completely settled (A-11).

Thereafter, on or about February 17, 1972, seven years after the first failure to file, five years after the government had begun its investigation, and two years after the Appellant had paid his entire tax liability, Appellant was indicted for willful failure to file income tax returns for the years 1965, 1966 and 1967.

Trial was commenced on December 21, 1976, four years and ten months after the indictment was returned.

During the course of the trial, testimony was introduced which indicated that the causes of Appellant's failure to file were, 1) marital difficulties (A-12), 2) Appellant's wife's psychiatric problems (A-14), 3) Appellant's surgery and subsequent illness (A-17), and 4) Appellant's overextension of his law practice (A-19).

On Thursday, December 23, 1976, the jury
returned a verdict of guilty on all three counts.

POINT I

BY VIRTUE OF THE MORE THAN FIVE YEAR PRE-INDICTMENT DELAY AND FOUR YEAR, TEN MONTH POST-INDICTMENT DELAY, THE APPELLANT WAS DEPRIVED OF HIS RIGHT TO A SPEEDY TRIAL AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES, THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, THE RULES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK AND THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Chronology of Relevant Dates

February 2, 1967	Commencement of the investigation of Appellant's returns by the Collection Division of the Internal Revenue Service.
August 1968	Transfer of the investigation to the Criminal Branch of the Internal Revenue Service.
October 29, 1968	Appellant files 1965 return.
October 29, 1968	Appellant files 1966 return.
September 1968 to August 1970	Appellant meets with Internal Revenue Service Agent Kolb on more than fourteen separate occasions.
April 16, 1969	Appellant files 1967 return.
November 5, 1970	Appellant pays all outstanding tax liability.
February 17, 1972	Indictment
March 22, 1972	Government's motion to move action for trial.

May 5, 1972	Government's Notice of Motion for the court to set a date for trial.
October 5, 1972	Government's Notice of Motion to set a date for trial.
May 14, 1974	Government's notice of readiness.
May 15, 1974	Government's Notice of Motion to set a date for trial.
September 10, 1974	Government's Notice of Motion for status and determination of counsel.
October 9, 1974	Government's Notice of Motion to set a trial date.
October 9, 1975	Defendant's Motion to Dismiss for failure to prosecute.
October 21, 1975	Government's response to defendant's Motion to Dismiss.
December 8, 1975	Decision and Order of the Hon. Harold Burke.
April 28, 1976	Government's Notice of Motion to set a trial date.
October 4, 1976	Government's Notice of Motion to assign a new judge.
December 3, 1976	Government's motion to set a trial date.
December 21, 1976	Defendant's Motion to Dismiss for failure to prosecute.
December 21, 1976	Commencement of trial.
December 23, 1976	Conclusion of trial by verdict of guilty.
February 8, 1977	Judgment of the District Court.

Introduction

As the above chronology makes clear, the overall delay in Appellant's trial was extraordinary. Final disposition of the case occurred more than ten years after the Internal Revenue Service began its investigation, and five years after the indictment was returned. Given the small sum of money involved, the simplicity of the Government's case, and Appellant's constant availability within the jurisdiction of the Western District, the delay is inexcusable.

It is Appellant's contention that the post-indictment delay of five years, of itself, clearly violated his Sixth Amendment right to a speedy trial, the Rules of this Court and the United States District Court for the Western District of New York on prompt disposition of criminal trials, and Rule 48(b) of the Federal Rules of Criminal Procedure. Appellant contends further that this delay is particularly objectionable when it is viewed in light of the pre-indictment delay of five years.

A. Pre-Indictment Delay

In United States v. Vispi*, 545 F. 2d 328 (2nd Cir.

* The parallels between the present case and Vispi are striking. Both involve misdemeanor charges of failure to file income tax returns lodged against Buffalo area attorneys. Both cases were tried in the Western District of New York before the Hon. Harold P. Burke. Both involve considerable pre-indictment and post-indictment delay. As set forth hereinafter, however, the overall delay in the present case was approximately three times that in Vispi.

1976) this Court ruled citing, inter alia, United States v. Marion, 404 U.S. 307 (1971), that a Sixth Amendment claim of lack of a speedy trial may not be predicated upon pre-indictment delay alone. However, the Court did hold that for purposes of demonstrating the undue length of a post-indictment delay, pre-indictment delay may be significant.

Standing alone, the 20 month period, though far more than permitted under the since-enacted Speedy Trial Act..., could not by itself be classified as per se excessive. But as we pointed out in United States v. Roberts, supra., 515 F.2d at 646, "a delay not patently unreasonable in length may nonetheless be intolerably long in light of the peculiar circumstances of the case," quoting Barker v. Wingo, 407 U.S. 514, 530 (1972).

Here the circumstances demonstrate beyond doubt that the delay was unduly long. It is relevant that the 20 month period was immediately preceded by a period of approximately four to five years between the government's discovery of the alleged offense and the filing of the information... (T)his long stretch of time...did give the government ample time in which to investigate and marshal its evidence for an immediate trial following its filing of the information. (at p. 333)

This Court, in considering the five year post-indictment delay which ensued before Appellant was brought to trial, must also take into account the five year delay before Appellant was indicted.

The record discloses that the Criminal Division of the Internal Revenue Service was apparently actively pursuing this case as early as 1967, and certainly was doing so by 1968. Yet an indictment was not handed down until February 17, 1972. The factual elements of the charge in this case are simple and susceptible of easy and immediate determination. The question is simply whether the party under investigation did or did not file a return. A delay of five years in instituting proceedings is therefore both inexplicable and inexcusable, and therefore should be taken into account in the determination of the issues discussed hereinafter.

B. Post-indictment Delay - Violation of the
 Second Circuit Court of Appeals Rules
 and the Prompt Disposition Plan of the
 United States Court of Appeals for the
 Western District.

In 1971 the Court of Appeals for the Second Circuit, acting on its own initiative and relying on its own supervisory powers and 28 U.S.C. Section 332, issued the Rules Regarding Prompt Disposition of Criminal Cases. Rule 4 provides:

In all cases the government must be ready for trial within six months from the date of arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under Rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

On February 20, 1973, the Judges of the United States District Court for the Western District of New York adopted a rule titled, "A Plan for Achieving Prompt Disposition of Criminal Cases." Rule 4 of this plan parallels the rules of this Court.

As the above chronology shows, Appellant moved to dismiss the indictment on October 9, 1975, and again on December 21, 1976, more than one year later. Under the foregoing rules, denial of Appellant's motions was clear error. Although the government moved ready for trial on several occasions after the indictment, it seems manifest from the chronology of events that the government was never actually ready for trial until late 1976, nearly five years after the indictment. Appellant submits that the

government's notices, except the last, were "meaningless."

(See United States v. Pollack, 474 F 2d 828, 830 (2nd Cir. 1973); United States v. Pierro, 478 F 2d 386, 388 (2nd Cir.

1973). As the Court noted in United States v. Pierro, supra.,

The filing of a notice of readiness by the government within the six-month period does not, in all cases, foreclose defendants from asserting that the government was not, in fact, ready within six months.

Likewise, in United States v. Reingold, 384 F. Supp. 464, 466 (WDNY, 1974), the Court stated:

While the act of filing a notice (of readiness) comports with the procedure approved in United States v. Pierro, 478 F. 2d 386 (2nd Cir. 1973) the filing of such a notice alone, however, is not dispositive regarding any future delays.

This Court should take notice of the government's protracted inactivity between the October 5, 1972, notice of readiness and the May 14, 1974, notice of readiness, a period of some 20 months. The Court's attention is also ~~diverted~~ ^{directed} to the one year period of inactivity which elapsed between the government's October 9, 1974, notice of readiness and the Appellant's October 9, 1975, notice to dismiss for failure to prosecute. Surely Rule 4 is not to be read so as to allow the government to recite that it is ready and then to retire and do little or nothing for 54 months. Such a "wooden construction of the rule" (United States v. Pierro, supra., at 388) would completely undercut its purpose and usefulness.

As this Court stated in Hilbert v. Dooling, 476 F 2d 355 (2nd Cir. 1973):

In summary, the Rules are designed to require the government to be ready to try cases promptly, subject to certain types of delay generally recognized as arising from legitimate or unavoidable causes. The purpose of Rule 4 is to insure that regardless of whether a defendant has been prejudiced in a given case or his Constitutional rights have been infringed, the trial of the charge against him will go forward promptly instead of being frustrated by creeping, paralytic procedural delays of the type that have spawned a backlog of thousands of cases, with the public losing confidence in the courts and gaining the impression that federal criminal laws cannot be enforced.

Appellant asserts that the prompt disposition rules apply with particular force in the present case. The Court will note that the government's case in chief occupies a mere 46 pages of the transcript, that the witnesses were readily available federal employees, and that their testimony was lacking in complexity and easily presented.

Under both the Second Circuit Rules, and the Western District Plan, it is respectfully submitted that a five year post-indictment delay before trial of a misdemeanor indictment, especially when coupled with a pre-indictment delay of fully another five years, required dismissal with prejudice. The Appellant so moved in 1975 and 1976; it was error for the District Court not to grant the motions.

C. Post-Indictment Delay - Violation
of Federal Rule 48(b)

Rule 48(b) of the Federal Rules of Criminal Procedure was designed to implement the right of an accused to a speedy trial under the Sixth Amendment. Rule 48(b) provides:

- (b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer in the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

The Rule 48(b) rights which a defendant may claim are not only co-extensive with the Sixth Amendment, but are actually stricter. United States v. Cartano, 420 F. 2d 362 (1st Cir, 1970); United States v. Salzmänn, 417 F. Supp. 1139, 1172 (EDNY, 1976).

In United States v. Salzmänn, supra., the District Court stated:

That 48(b) requires dismissal where there has been a violation of a defendant's right to a speedy trial has long been clear. Pollard v. United States, 352 U.S. 354, 361 (1957); United States v. Ward, 240 F. Supp. 659, 660 (W.D. Wis. 1965); United States v. Palermo, 27 FRD 393, 394 (SDNY, 1961). Yet Rule 48(b) does more than implement constitutional guarantees:

...it is designed also to protect other compelling public interests - not necessarily of constitutional proportions - in the prosecution of those accused of crime without the procrastination of which the processes of law are sometimes guilty (417 F. Supp. 1173).

Thus, under 48(b), a delay in bringing the trial of an indictment, though not of constitutional proportion, may still require dismissal. (See Mann v. United States, 304 F. 2d 394, 398 cert. den. 371 U.S. 896 (D.C. Cir, 1962)). Given the nature of this case, that is misdemeanor charges susceptible of easy and fast disposition, the prosecution of Robert J. Lane is an especially disturbing example of inaction by the government.

Appellant contends that the defense was responsible for only a small and insignificant part of the overall delay. However, even conceding for the sake of argument that the defense is chargeable with substantial delay, the defense clearly was not responsible for the 1972 - 1974 lapse. Nor can the defense be charged with the government's inaction during 1975. Indeed, as the docket sheet indicates, (A-21) on October 15, 1974, George P. Doyle, Esq., Appellant's attorney, announced his readiness for trial.

Given the nature of this case and the duration of the delay, the District Court's denial of the Motions to Dismiss the indictment based upon a violation of Rule 48(b) was an abuse of discretion.

D. Post-Indictment Delay -
Sixth Amendment Violation

Barker v. Wingo, 407 U.S. 514 (1974) (see also United States v. Roberts, 515 F 2d 642 (2nd Cir. 1976 and United States v. Vispi, 545 F 2d 328 (2nd Cir, 1976) identifies four factors which the courts should consider in determining whether a defendant has been deprived of his right to a speedy trial. They are:

1. Length of delay

In the present case, the length of delay between the filing of the indictment against Appellant and the trial of that indictment was nearly five years. A delay of this duration in the prosecution of a simple three count misdemeanor charge of failure to file income tax returns is inexcusable. (See United States v. Vispi, supra, 333). As previously stated, Vispi, like the Appellant, was a practicing attorney in the City of Buffalo. By contrast, however, the period of delay in Vispi was only approximately one-third of that in the present case.

This Court has found post-indictment delays which were much shorter than the delay in Appellant's case sufficient to establish a Sixth Amendment violation (United States v.

Vispi, supra., (20 months); United States v. Roberts, supra., (16 months); United States v. Favaloro, 493 F 2d 623 (2nd Cir, 1974) (20 months).

It has been held that a Sixth Amendment challenge is prima facie meritorious where there has been a delay of more than one year between arrest and trial. United States v. West, 504 F 2d 253 (D.C. Cir., 1974). (See also United States v. Latimer, 511 F 2d 498 (10th Cir, 1975), (11 months sufficient to give merit to the claim) and United States v. Calloway, 505 F 2d 311 (D.C. Cir. 1974) (15 months)). In United States v. Fay, 505 F 2d 1037 (1st Cir, 1974), the court held that the defendant's right to a speedy trial was violated where there was a nine month delay between the third date set for trial and the date of the trial providing the defendant did not contribute to that delay. It would seem that if the rule laid down in Fay is to be applied to the present case, this appeal must be resolved in favor of the Appellant, inasmuch as there were at least two periods of delay exceeding nine months to which neither the Appellant nor his counsel contributed.

2. Reason for delay

Although it must be conceded that the Appellant is responsible for some part of the five year delay before trial, he is clearly not chargeable with substantial delay and he is not chargeable with any delay after October 1974. In October 1974 Appellant's attorney, George P. Doyle, announced that he was ready for trial (A-21). Although the indictment was already 32 months old, the government did nothing (A-21). Thus in October, 1975, 44 months into the delay, Appellant revived the case by moving for dismissal for failure to prosecute (A-21). Thereafter, the government did not move ready for trial until six more months has passed (A-21).

Relevant to this delay are the Court's comments in United States v. Vispi, supra.:

Regardless of the judge's inaction or the fact that the delay may have been in part attributable to institutional factors, the government was not entitled to sit back and rely on its pro forma notice of readiness; it owed the additional duty of monitoring the case and pressing the court for a reasonably prompt trial. We have repeatedly emphasized that affirmative action by the government in bringing cases to trial is mandated.... (Emphasis supplied)

Under the Vispi decision, and cases cited therein, it is respectfully submitted that no less than 24 months of the delay is chargeable to prosecutorial and court inaction.

3. Defendant's Assertion of His Rights

As early as May 28, 1973, Appellant was ready for trial (A-20). Again, on October 15, 1974, Appellant, by his attorney, indicated readiness for trial (A-21). Thereafter, because of government inactivity, Appellant was forced to move for dismissal in October, 1975 (A-21). These indications of Appellant's readiness for trial and demand of his Sixth Amendment rights are carefully documented in the Western District's Criminal Docket Sheet (A-20 - A-21).

4. Prejudice to the Defendant

The indefinite prolongation of a pending indictment is inherently prejudicial to a defendant. It may subject him to "public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes."

Klopfer v. North Carolina, 386 U.S. 213 (1966). The psychological, physical and financial stakes of a defendant in the prompt determination of the pending indictment are significant.

United States v. Roberts, 515 F 2d 642 (2nd Cir, 1975).

The touchstone of the Sixth Amendment right to a speedy trial is the minimization of the anxiety and concern accompanying a public accusation as well as the restraint upon his liberty, or as it has been said, the continuing presence of the Damoclean Sword. United States v. Ewell, 383 U.S. 116, 120 (1966); Barker v. Wingo, 407 U.S. 514, 533 (1971); Tarlton v. Saxbe, 507 F 2d 1116 (D.C. Cir, 1974).

Robert J. Lane is an attorney at law. As such, public trust in his integrity is an absolute necessity. Thus, a pending indictment must have a much more profound impact on his practice and on his income than in the case of a non-attorney. (See United States v. Vispi, supra.) As this Court also acknowledged in Vispi, where the defense to the charge of failure to file is negligence or pressure of overwork (as it was in this case), delay will make location of old records as well as the remembrance of past events difficult, and protracted delay in such a case is perforce prejudicial.

CONCLUSION

The Judgment of Conviction of Robert J. Lane should be reversed and the Indictment dismissed for the following reasons:

1. The Appellant was deprived of a speedy trial as guaranteed by the Rules of the United States Court of Appeals for the Second Circuit and the Western District Rules for prompt disposition of criminal cases.

2. It was an ^{abuse} ~~abuse~~ of discretion for the District Court not to dismiss the indictment pursuant to Federal Rules of Criminal Procedure 48(b).

3. The Appellant was denied his right to a speedy trial in violation of the Sixth Amendment to the Constitution of the United States.

Dated: April 29, 1977

Respectfully submitted,

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MR. DOYLE: Your Honor, I am respectfully asking to have him testify for the jury what the taxable income was for those three years. I think that is a proper question.

MR. HOULIHAN: Your Honor, I agree with the Court's position on the item "gross income." In addition, each of the tax returns that are in evidence do show the taxable income. I intended to create no other inference. The tax returns are there for the jury to read.

MR. DOYLE: That is the only reason I'm asking the question, Your Honor.

THE COURT: What is the question?

MR. DOYLE: "What was the taxable income for those three years?"

THE COURT: I will permit the answer to that, but I will tell the jury that the taxable income is not what makes him file a return -- it is the gross income. But if counsel wants that in, I will receive it in. I don't know why, but I will receive it anyway.

THE WITNESS: The taxable income from G-1, the '65 1040, is \$13,564.63. The taxable income from G-2, which is the '66 1040, is \$7,412.68. The taxable income from G-3, which

is the '67 1040, is \$8,721.41.

Q You indicated, Mr. Pelland, in your direct examination that there was no estimated taxes filed for the taxable year '65, is that correct?

A Yes, sir.

Q Were there withholding wages during that period?

A Yes, sir.

Q And that, again, is reflected in the return?

A Yes, sir.

Q With respect to Government's Exhibits 7, 8, 9, 14 and 15, is there reflected, sir, on those Exhibits one payment on November 5th, 1970, paid to the IRS in connection with the three taxable years of '65, '66 and '67?

THE COURT: That is a pretty complicated question because it embraces seven documents. Maybe the witness understands it -- I don't.

THE WITNESS: There is a reflection on the record for the calendar years 1965, 1966 and 1967 that there was a payment made for all three periods on November 5th, 1970.

Q And was that payment, again, just roughly in the amount of some nineteen to twenty thousand dollars?

A No, sir.

Q How much was it?

A Approximately \$15,000.

A I'm employed by the United States Treasury, Internal Revenue Service, Andover Service Center, Andover, Massachusetts.

Q How long have you worked with the Internal Revenue Service?

A Twenty years.

Q In what capacity do you work for them?

A My title is Senior Accounting Technician.

Q In your capacity as Senior Accounting Technician at the Andover Service Center, are you the custodian of the filed income tax returns for the Northeastern United States?

A Yes.

MR. HOULIHAN: Would you mark these for identification?

(Government's Exhibits 1, 2 and 3 marked for identification.)

Q Mr. Pelland, I show you Exhibit 1 marked for identification. Can you tell me what that is?

A Yes. This is a United States Individual Income Tax Return Form 1040 of the calendar year 1965, the name, Robert J. and Delores E. Lane. It is an original return.

Q When was that filed?

A It was received October 29th, 1968.

Q I show you Government's Exhibit 2 marked for identification. Can you tell me what that is?

A It is the United States Individual Income Tax Return,

Form 1040, for the calendar year 1966, the name Robert J. and Delores E. Lane. It is an original return.

Q When was that filed?

A It was received October 29, 1968.

Q I show you Government's Exhibit 3 marked for identification. Can you tell me what that is?

A This is a United States Individual Income Tax Return, Form 1040, for the calendar year 1967, the name Robert J. and Delores E. Lane. It is an original return.

Q When was that filed?

A It was received April 16th, 1969.

(Government's Exhibits 4, 5 and 6
marked for identification.)

Q Mr. Pelland, I call your attention to the income tax return for the year 1965, Government's Exhibit 1. Can you tell us what the gross income is on the face of that return?

A Yes. There is income of \$22,275.75 from a Schedule C, and there is also income of \$5,200 from W-2 wages.

Q And the Schedule C is business income, is that correct?

A Yes, sir.

Q Excuse me, but you gave \$5,200 on this first one. It looks like it is a "3" and not a "5."

A Yes, sir, it is. It is \$3,200, and not \$5,200.

Q And was then apportioned out by those three tax years by your Service?

A Would you repeat that question?

Q You have got a payment on November 5th of some \$4,394, isn't that correct?

THE COURT: He gave the total payment of about \$15,000.

MR. HOULIHAN: That's right.

Q What I am getting at, sir, simply is can you tell us how those specific figures of four thousand, four thousand and six thousand that added up to some fifteen, sixteen thousand dollars were arrived at?

A No, sir, I cannot.

MR. DOYLE: Would you mark this for identification?

(Defendant's Exhibit 1 marked for identification.)

Q Mr. Pelland, I'm showing you what has been marked as Defendant's Exhibit No. 1 for identification and ask you, sir, if you can identify that document for us?

A Yes, I can. This is a check made payable to the Internal Revenue Service under the name of Robert J. Lanz, Attorney at Law. It is for the amount of \$15,477.20. It was received and dated November 17, 1970, at our office.

Q Then, sir, were notations made on this particular check

know his handwriting?

A Exactly.

Q You are not a handwriting expert?

A No, sir.

Q Are there any notations at all, sir, again, such as his initials, during that period of time?

A The front of the form shows that it was assigned to A-4; that is the assignment to Mr. Conley. It was assigned to him on 2-2-67. That is where it would show he had it previous to me.

Q My question now, sir, if you would answer my question, please, is there any initials or any sort of identifying marks that is used on those previous notations prior to your notation of May 2nd, 1968?

A No, sir.

Q Do you have any personal knowledge as to the truth or correctness of what is contained in those notations, any personal knowledge?

A I spoke to Mr. Conley about it, yes.

Q Were you there, sir, at all, as an example in October of '67?

A No, I wasn't.

Q I'm talking about personal knowledge, and not what somebody told you?

A No.

Q What is the function of a Revenue Officer?

A The function of a Revenue Officer is to pick up delinquent returns and collect taxes on the accounts that are assigned to him that people have been delinquent on.

Q Did there come a time in the course of your duties as a Revenue Officer that a case was transferred to you involving a taxpayer by the name of Robert J. Lane?

A Yes, sir.

Q When was this case transferred to you?

A I think it was April 23rd, 1968.

Q Prior to this time was this case handled by another Revenue Officer?

A Yes, it was.

Q Who was that?

A Francis Conley.

Q And Mr. Conley is no longer with the Internal Revenue Service?

A That's right. He is retired.

Q After you received transfer of that file, what, if anything, did you do?

A Well, I went to the Intelligence Division to see if they had any cases on this taxpayer, No. 1; No. 2, after I found out at the time they did not have any, I made a telephone call to the office of Robert J. Lane, and he wasn't in. I left a message, and I think it was on May 13th,

office when you asked for him?

A No, he didn't.

MR. DOYLE: I have no other questions.

MR. HOULIHAN: I have no further questions.

(Witness excused.)

R O N A L D K O L B,

called as a witness by the Government, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. HOULIHAN:

Q Mr. Kolb, by whom are you employed?

A By the Internal Revenue Service, Intelligence Division.

Q How long have you worked for the Internal Revenue Service?

A Since May of 1967.

Q And in what capacity have you worked for them?

A As a Special Agent, as a Group Manager, and now as Chief
in Louisville, Kentucky.

Q What are your duties as a Special Agent in the Intelligence
Division?

A The duties of a Special Agent are to investigate the
possibility of criminal tax fraud.

Q And in the course of your duties as a Special Agent, did
there come a time that you were assigned to a case involv-
ing a taxpayer, Robert J. Lane?

A Yes.

A Yes.

Q When was that?

A August 15, 1968.

Q And did there come a time that you had an interview with Mr. Lane?

A Yes.

Q When was that?

A The first interview with Mr. Lane was on September 20, 1968.

Q When you had this interview with Mr. Lane on September 20, 1968, what, if anything, did you say to him?

A I informed him of the investigation of the failure to file his personal Form 1040 for the year 1965, '66 and '67. I displayed my credentials and informed Mr. Lane of the functions of a Special Agent and advised him of his Constitutional rights. And then we had an interview after that.

Q Where did this meeting take place?

A In the office of the Intelligence Division in Buffalo.

Q At the time of this interview, did Mr. Lane tell you about his educational background?

A Yes, sir. We discussed Mr. Lane's background and his history.

Q When you spoke with him during the interview, did you take notes?

A Yes.

identification?

(Government's Exhibit 20 marked for
identification.)

Q Mr. Kolb, I think you went through in some kind of a day-by-day basis for us, sir, some ten or twelve meetings you had with Mr. Lane?

A Yes.

Q And the last two of which, as I understand it, took place in 1970, is that correct?

A That's correct.

Q Incidentally, formal charges against Mr. Lane, to the best of your knowledge, sir, were filed when?

A I believe February of '72.

THE COURT: You mean the Indictment?

MR. DOYLE: Yes.

THE WITNESS: I believe February of '72.

Q In connection with these interviews, is it fair to say that you and your agency were going over his records carefully?

A Yes.

Q And the purpose of this meeting was to facilitate that particular job, to make it easier for your people?

A The purpose of it would be for Mr. Lane to explain to us the exact reasoning for various entries in books and records so that our analysis would be correct.

when he did for the first time mention to you some illness that had taken place with his wife, is that correct?

A In that she had been under the care of a psychiatrist for about two years.

Q And you recorded that on your record, haven't you?

A Yes, I did.

Q Incidentally, by May of 1970, all three returns had already been filed, had they not, for '65, '66 and '67?

A Yes.

Q In fact, two of them had been filed as far back as '68, isn't that right?

A That's correct.

Q And one in early '69?

A Yes.

Q So that by May of 1970, as you have indicated, the three returns were already filed. Now my question to you is did you at that interview or around those last interviews inform Mr. Lane that it would be the normal policy of your agency to interview his wife?

A I can't state whether it would be normal policy, but it would have been my intention to interview Mr. Lane's wife, but I thought it proper that I ask him first.

Q Fine. That is what I'm getting at. Certainly with a joint return, sir, it would be normal practice to interview the wife, wouldn't it?

Q What is your educational background, Mrs. Hill?

A I have a Bachelor's Degree in education. I have a Master's and Ph.D. in counseling psychology.

Q When did you acquire your Ph.D. in psychology?

A 1972.

Q Do you know Mr. and Mrs. Lane?

A Yes.

Q And how long have you known Mr. and Mrs. Robert Lane?

A Approximately twenty years.

Q Did you know them before they were married?

A Yes.

Q I'm addressing your attention, Mrs. Hill, to the period 1964 to 1968, a decade ago. Would you describe, please, your friendship during that period with Mrs. Lane?

A My friendship, as it remains today, I would classify her as my best friend. We are extremely close, and shared many of our personal circumstances with each other.

Q You were best friends with her as well?

A Yes.

Q During the period 1964 and 1968, could you describe for this jury, please, what, if anything, you observed about the home environment at the Lane residence?

A There was a lot of marital conflict. Mrs. Lane was at that time having three or four children quite close in succession. There were a lot of home demands for her time

and her energies at that time. She was under a lot of pressure because her husband at that time was a young lawyer building his practice and was unavailable due to business reasons.

Q To your knowledge during this period of time, was Mrs. Lane on medication?

A Yes, she was.

Q Did you have conversations with her from time to time?

A Yes, very frequently.

Q Were you able to understand all of this conversation?

A For the most part, yes.

Q Did you notice anything unusual about the conversation again in connection with the medication that you understood she was under?

MR. HOULIHAN: Your Honor, I'm not sure I understand why this is relevant, the ability of Mrs. Lane --

THE COURT: I don't either.

MR. HOULIHAN: I object to it.

THE COURT: Pick it up when you get to it.

Would you restate the question?

Q I'm asking from your observations at the Lane household during this period of time if it was a normal household?

A No.

home from somewhere, and we had a violent argument, and I --

THE COURT: Counsel, the charges here relate to the failure to file, and the first one was due in May of 1966. This is five years before that. What has it got to do with this case, five years before that?

MR. DOYLE: I'm attempting to show, respectfully, Your Honor, a situation that degenerated up to and including the period of time under inquiry.

THE COURT: We are concerned in this case with the dates when these returns were due.

MR. DOYLE: Fine, Your Honor.

Q In any event, Mrs. Lane, in just a "yes" or "no" answer, if you can, please.

A Yes.

Q Now as to this question, did this particular situation, talking about the emotional problems you were having, continue to develop up through '65 and '66?

A They got worse every day.

Q Did there come a time during February of 1966 that, again, the difficulties that you have described, you again attempted to take your own life?

A For the third time, I think it was by that time, yes. I was on the third time.

Q And once, again, Mrs. Lane, specifically, sometime in 1968 did there then happen a fourth time when you attempted the same thing?

A 1968, yes. That was the worst and final time.

Q During this period starting with '64 up through '68, did you seek psychiatric help?

A Yes. I saw a Dr. George Masotti. I think it was in '64 after I had Joanne, after the first or second suicide attempt.

Q Had you had a family doctor prior to that?

A Yes, Dr. O'Brien after the first suicide attempt, he recommended Dr. Masotti.

Q And you did go and see Dr. Masotti and get treated by him?

A Right, yes.

Q Did there come a time when both you and your husband saw a psychiatrist?

A Yes. We saw a psychiatrist during our separation. We were separated for awhile.

Q Do you recall when that separation was?

A I think it was in '68.

Q Did there come a time ultimately when you saw still a third psychiatrist?

A Yes. It was the following July. And I wasn't happy with my progress, and I chose another doctor, and he has been helping me ever since.

Q That would have been July 8th of 1968?

A Yes, sir.

Q During this particular period of time, '64 to '68, again, Mrs. Lane, without going into any degree of specificity, can you describe the general home atmosphere for that four-year period of time?

A It was constant fighting. I was very lonely, and I blamed my husband. He was tired, and we couldn't seem to be able to solve our problems.

Q Were you able to carry on again in the latter portion of that period from '64 to '68? Were you able to carry on your normal duties in connection with the upkeep of the house?

A It got very hard near the end, when Dr. DeZeeuw finally put me to bed for two months. My husband did all the cooking and housework.

MR. HOULIHAN: May I have a date on this,
if Your Honor please?

Q When was that?

A The summer of '68.

THE COURT: What?

A The summer of '68, all summer long and into the fall, and several times since then.

Q When was the first time, Mrs. Lane, you learned of any difficulties your husband was having with the Internal

C13

Q Sir, with respect to the 1967 return, did you file your income tax return on April 15, 1968?

A I did not.

Q Did you make an application for extension on or about April 15, 1968?

A Yes, I did make such an application.

Q Let's just briefly talk about April of 1968. Could you tell us, sir, what, if anything, occurred in April of 1968, the month in which your '67 return was due?

A Yes, sir. Around maybe the 10th of April I went into the hospital for shoulder surgery. I had a chronic dislocated shoulder for many years, which would fall out of place, and even got to the extent when I rolled over at night while asleep. And I went in for surgery for that and was discharged from the hospital, I think, about the 13th or 14th of April.

Q Had that surgery been scheduled, as a matter of fact, in March of that same year?

A That is correct, sir.

Q During this period, on or about April 15, 1968, were you aware that your income tax was due?

A Yes, I was aware. I had anticipated that the surgery would leave me convalescing at home and that I couldn't go to work. I brought some records home with me. As a matter of fact, I brought all the records home with me

that I had in anticipation that I would prepare my return during that period of convalescence.

Q Were you able to do that by April 15, 1968?

A No, I was not. I had a very difficult time. If I might bring it back, I had changed offices just in January of 1968, and I had been with a series of other lawyers, and I did not have available to me at home the adequate records to prepare the return at that time. I tried to reach them by phone and could not, and so consequently, I applied for an extension.

Q How did you apply for the extension, Mr. Lane?

THE COURT: How and when?

A To the best of my recollection, Your Honor, it was on the 15th when I found I could not finish the return, and I had no forms available, so I wrote, or my wife wrote a handwritten letter and she took it from the house and mailed it.

Q You thereafter received notice that that letter had been, in fact, received by the IRS?

A I did.

Q That they were denying your application?

A That is correct.

THE COURT: What did you tell them?

You have got to give a reason to get an extension.

What did you tell them?

And at that time we informed Mr. Lane and his attorney of the approximate amounts of gross income and taxable income and tax for those three years, and then we asked them if they had any further information or anything they wanted to tell us at that time.

Q And you said Mr. Walsh was representing Mr. Lane at that time?

A Yes.

Q And Mr. Walsh filed a power of attorney?

A Yes -- well, no, I will back off. No, he did not file a power of attorney. He did inform me he was going to represent Mr. Lane, and at that time he didn't think a power of attorney was necessary to be filed because he would always be with Mr. Lane.

Q Okay, and Mr. Lane was present, then?

A Yes.

Q And at that time was there any discussion concerning why Mr. Lane had not filed his tax return?

A Yes, there was.

Q And what were those?

A Mr. Lane said at that time that it was always his intention to file income tax returns and that he did not intend to defraud the Government of any tax. He said he did not file timely tax returns for the years 1965, 1966 or 1967 because he was over-extended in his law practice,

U ✓

A-20
HAROLD P. BURKE
CR-1972-37

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	
ROBERT J. LANE	
Did wilfully and knowingly fail to make income tax return, in violation of Section 7203, Title 26, U.S.C.	
	For Defendant:
	Charles McDonough, Esq.
	Robert Kaiser, Esq.
	(of counsel)
	George Doyle, Esq.
	John Condon, Esq.
	(of counsel)
Offenses: 1965 1966 1967	3 Cts

[illegible]

DATE	PROCEEDINGS
1972	
Feb. 17	Filed Indictment #1
Feb. 17	J.S. 2 made
Feb. 17	The deft being duly arraigned enters a plea of not guilty
Feb. 13	Filed Ct. stenographer's minutes of 2/17/1972
Mar. 22	Filed Govt's motion to move action for trial #2
May 5	Filed the Govt's notice of motion, motion, and affidavit with proof of service, for the Court to set a date for trial of this action, etc., ret. 5/22/1972-Roch. #3
May 22	Trial to follow Cr-1972-61. No appearance for deft.
Oct. 5	Filed the Govt's notice of motion and motion to set a date for trial for criminal trial calendar for the October 1972 trial term ret. 10/10/72 at Roch. #4
Oct. 24	Filed four subpoenas (D.T.) - Robert A. Casell, Robert C. Fulton, Lorin Luderman, Norma R. Fox, served 10/19/1972
Oct. 26	Filed six subpoenas (D.T.) - Manufacturers and Traders Trust Co., and Dante Marasci, Arlene Lamm, Joseph J. King, Francis E. Conley, served 10/25/1972; Buffalo General Hospital and Eileen Edwards, James Cole, M.D., served 10/27/1972
1973	

PROCEEDINGS

DATE

1973

- Dec. 3 Filed subpoena Harry Kusztelniak, served 11/2/1973
- 74
- 14 Filed Govt's notice of Readiness #5
- May 15 Filed Govt's notice of motion and motion to set date for trial for the criminal trial calendar, ret. 5/28/1974-Roch. #6
- May 28 Motion by Govt. to set date for trial. The Government is ready and advises the Court that the Deft. is ready. The Court instructs the Govt. to find out if the case can be tried June 3, 1974.
- Sept. 10 Filed Govt's notice of motion and motion for Status and Determination of counsel, ret. 10/15/74-Roch. #7
- Oct. 9 Filed the Govt's notice of motion and motion to set date for trial for the criminal trial calendar, ret. 10/15/74, Roch., w/affidavit of service #8
- Oct. 15 Motion by Govt. for status and determination of counsel. Motion by Govt. to set date for trial. George Doyle, Esq., advises the Court that he will be representing the deft. and is ready for trial. Trial to follow DiGaetano.

1975

- Oct. 9 Filed Deft Robert J. Lane's notice of motion and motion to dismiss the Information, etc., ret. 10/14/75-Roch. #9
- Oct. 14 Motion by Deft. to dismiss to be submitted today.
- Oct. 21 Filed Govt's response to defendant's motion for dismissal for failure to prosecute #10
- Dec. 8 Filed Decision & Order denying deft's motion to dismiss-BURKE, J. #11

1976

- Apr. 28 Filed Govt's Notice of Motion to set a date for trial for criminal trial calendar, ret. 5/10/76-Roch. #12
- May 10 Motion by Govt. to set date for trial. The Govt. and the Deft. are ready for trial. Trial date 6/1/1976.
- Oct. 4 Filed Govt's Notice of motion and Motion for an Order assigning a Judge to assume responsibility in the above case, and is submitting this motion to the Court for decision without oral argument. #13 Govt. makes application for an order assigning one or more Judges to assume responsibility for this and other cases that they may be tried within the time period prescribed by the Speedy Trial Act. (18 U.S.C. et. seq.) Sect. 3161
- Dec. 3 Filed Govt's motion to set a date for trial, ret. 12-13-76. #14
- Dec. 13 Motion by Govt. to set date for trial. The Govt. and the deft. are ready for trial. Trial date 12/21/76
- Dec. 21 Case is moved ready for trial. The jury is duly empaneled. Trial is adj. until 12-22-76.
- Dec. 22 The Govt. rests. The jury is excused. The Deft. moves for a directed verdict of acquittal. Denied. The Deft. rests. Trial is adj. until 12-23-76.
- Dec. 23 After listening to a charge by His Honor, Judge Burke the jury retires to deliberate upon their verdict. The jury returns with the following verdict: Guilty count one, guilty count two, guilty count three. Sentence is set for 1-10-77

1977

- Jan. 10 Sentence Adj. until 1/24/1977
- Jan. 24 Defendant is sentenced as follows: The Court: On Count One, I impose a fine of \$1,000.00. On Counts two and Three, I impose a fine of \$500.00 on each count. Fine to be paid in ten days. -Burke, J.

BEST COPY AVAILABLE

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
1977			
Feb. 2	Filed Deft's notice of Appeal		
Feb. 4	copy of notice of appeal and docket entries mailed to CCA.		
Feb. 8	Filed Judgment #15		
Feb. 25	Filed suppl. notice of appeal on 2nd Cir. Form - with acknowledgement of the Ct. Steno's re transcript; Cy. mailed to the CCA.		
Mar. 29	Filed 5 volumes of trial transcript.		
	#16 Trans Motion of GPD		
	#7 Transcript		
	#18 Motion to Dismiss later later 12/24		

UNITED STATES COURT OF APPEALS : SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

ROBERT J. LANE,

Defendant-Appellant

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

CONSTANCE L. OHLHUES, being duly sworn, deposes and says: that deponent is not a party to the action, is over 18 years of age and resides at 1240 Delaware Avenue, Buffalo, New York. That on the 4th day of May, 1977, deponent served the within brief on appeal upon Gerald J. Houlihan, Esq., Attorney for the United States of America in this action, at the United States Courthouse, Rochester, New York, 14614, the address designated by said attorney for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States post office department within the State of New York

Sworn to before me this
4th day of May, 1977.

Robert S. Sichel

ROBERT S. SICHEL
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978

DOYLE & DENMAN
ATTORNEYS AT LAW

Constance L. Ohlhues

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF

ss.:

INDIVIDUAL VERIFICATION

deponent is the , being duly sworn, deposes and says that read the foregoing in the within action; that deponent has and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF

ss.:

CORPORATE VERIFICATION

of , being duly sworn, deposes and says that deponent is the named in the within action; that deponent has read the foregoing the corporation and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation. Deponent is an officer thereof, to-wit, its The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF

ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within attorney(s) for upon in this action, at

the address designated by said attorney(s) for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York. Sworn to before me, this day of 19

NOTICE OF ENTRY

Sir :- Please take notice that the within is a (certified) true copy of a
 duly entered in the office of the clerk of the within
 named court on 19

Dated,

Yours, etc.,

DOYLE & DENMAN

ATTORNEYS FOR

OFFICE & POST OFFICE ADDRESS
 10 ELLICOTT SQUARE COURT
 ELLICOTT SQUARE BUILDING
 BUFFALO, NEW YORK 14203
 (716) 856-3486

To

Attorney for

NOTICE OF SETTLEMENT

Sir :- Please take notice that an order

of which the within is a true copy will be presented
 for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
 at M.

Dated,

Yours, etc.,

DOYLE & DENMAN

ATTORNEYS FOR

OFFICE & POST OFFICE ADDRESS
 10 ELLICOTT SQUARE COURT
 ELLICOTT SQUARE BUILDING
 BUFFALO, NEW YORK 14203
 (716) 856-3486

To

Attorney for

INDEX NO.

YEAR 19

STATE OF NEW YORK

U. S. COURT OF APPEALS COURT

County of ERIE

THE UNITED STATES OF
 AMERICA,

Plaintiff/
 Appellee

VS.

ROBERT J. LANE,

Defendant/
 Appellant

ORIGINAL

AFFIDAVIT OF SERVICE

DOYLE & DENMAN

ATTORNEYS FOR Defendant/Appellant

OFFICE & POST OFFICE ADDRESS
 10 ELLICOTT SQUARE COURT
 ELLICOTT SQUARE BUILDING
 BUFFALO, NEW YORK 14203
 (716) 856-3486

To

Attorney for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney for

SAMSON PAPER CO., CONSHOHOCKEN, PA.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK, COUNTY OF

ss.:

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at approx. A.M./P.M. at No.
 deponent served the within

upon the person so served to be the person mentioned and described as follows:

☐ Male ☐ White Skin ☐ Black Hair ☐ 14-20 Yrs. ☐ Under 5' ☐ Under 100 Lbs.
☐ Female ☐ Black Skin ☐ Brown Hair ☐ 21-35 Yrs. ☐ 5'0"-5'3" ☐ 100-130 Lbs.
☐ Yellow Skin ☐ Blond Hair ☐ 36-50 Yrs. ☐ 5'4"-5'8" ☐ 131-160 Lbs.
☐ Brown ☐ Gray Hair ☐ 51-65 Yrs. ☐ 5'9"-6'0" ☐ 161-200 Lbs.
☐ Red Skin ☐ Red Hair ☐ Over 65 Yrs. ☐ Over 6' ☐ Over 200 Lbs.

Other identifying features:

Sworn to before me, this

day of

19

Signature of Server